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Present: Fisher C.J. and Garvin J.

HALL *v.* PELMADULLA VALLEY TEA AND RUBBER CO., LTD., *et al.*

326—D. C. Ratnapura, 4,107.

Contract—Agreement to transfer land—Registration—Sale to plaintiff—Notice—Trusts Ordinance, No. 9 of 1917, s. 93.

By a notarial contract, the added defendant, after reciting that he had agreed to sell 1,000 acres of land to the defendant company, bound himself to give effect to that agreement and to deduce a good and valid title.

In pursuance of the agreement the company was placed in possession of certain blocks of land which form the subject-matter of the present action.

The plaintiff, with notice of the said agreement, purchased the land and sought to eject the company therefrom.

Held, that the contract was an existing enforceable contract within the meaning of section 93 of the Trusts Ordinance and that the plaintiff was bound to hold the property for the benefit of the company to the extent necessary to give effect to the contract.

The proviso to section 93 of the Trusts Ordinance does not prevent the application of the section to contracts affecting immovable property, which are not required by law to be registered.

THIS was an action instituted by the plaintiff for declaration of title to certain blocks of land and for ejectment of the defendant company. The added defendant had placed the company in possession of the land in pursuance of an agreement entered into between him and the company, by which he undertook to sell to the latter 1,000 acres of land in the vicinity of Rilhena estate belonging to the company. In breach of the said agreement the added defendant transferred the land to the plaintiff. The defendant company contended that the transfer to plaintiff was void and asked for a declaration, ordering the added defendant to execute a conveyance in their favour. The learned District Judge gave judgment for the defendant company.

Keuneman (with *Ferdinands*), for plaintiff, appellant.—The defendant company cannot rely on section 93 of the Trusts Ordinance because they have not registered the agreement to transfer the 1,000 acres. The document became registerable once the lands were ascertained. The company should have had a supplementary deed drawn up, giving the description of the lands, when ascertained, and registered that deed.

The agreement is not one of which specific performance can be enforced as it is indefinite. There is no definite *corpus* described in it in respect of which the remedy can be granted.

Further, as it provides for payment of damages in the event of a breach, the Court will not decree specific performance. The company never at any time made a proper tender of the purchase price or of a draft conveyance. The company had committed a breach of the agreement and was not entitled to claim specific performance.

Hayley (with *Bartholomeusz* and *Choksy*), for defendant, respondent.—The company is entitled to claim the land from the plaintiff under section 93 of the Trusts Ordinance. The proviso requiring registration cannot defeat the company's claim because the document was not registerable. The proviso can only apply to a case where a document is in fact registerable but has not been registered. It was so held by the Privy Council in *White v. Neaylon.*[1] Counsel cited *In re Calcott and Elvins Contract (1898), 2 Ch. 460; 13 Halsbury, pages 86 (f), 87.*

A purchaser, who finds a third party in possession, must make inquiry as to his rights; otherwise he is bound by the equities between the party in possession and the vendor. If he does not do so, he is deemed to have notice of the rights and equities of the party in possession. *Daniel v. Davidson,*[2] *Hunt v. Luck,*[3] *Barnhart v. Greenshields.*[4]

On the question of specific performance, it is submitted that the uncertainty created by the absence of any description of the company in the agreement to sell can be overcome by the election of the party having the right to elect. *Fry on Specific Performance, p. 160; Rumble v. Heygate*[5]*; Oxford v. Provand*[6]*; Howard v. Hopkins.*[7] Where the agreement is not strictly complied with, and if damages can remedy small non-compliances, and it is conscientious to decree specific performance, and there has been no gross negligence, Courts of Equity will enforce. *Storey on Equity, paragraph 775; Lord v. Stevens*[8]*; Parker v. Taswell.*[9]

Keuneman, in reply.—The appropriation of lands to the agreement to transfer can only be by a notarial document in view of the Ordinance of Frauds and Perjuries, No. 7 of 1840. This requirement cannot be fulfilled by the company being merely in possession.

It is only when one party has completely fulfilled his obligations under a contract that a Court will declare that the other party is bound to fulfil his part. The company claimed a set-off when

[1] *11 A. C. 171.*
[2] *16 Ves. (Jnr) 249.*
[3] *(1902) 1 Ch. 428 and 18 T. L. R. 265.*
[4] *9 Moore P. C. 18.*
[5] *118 W. R. 749.*
[6] *L. R. 2 P. (C. A.) 135.*
[7] *2 Atk. 378.*
[8] *1 Y. and C. 222.*
[9] *2 de J. and J. 559.*

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offering to tender the purchase price. Specific performance will not be allowed if there has been unreasonable procrastination. *Bennet v. Stone.*[1]

The sum of Rs. 10,000 is a fractional pre-estimate of the damages, and therefore there can be no specific performance.

Soertsz, for added defendant, respondent.

March 8, 1927. FISHER C.J.—

The history of this action begins in 1909, when, as stated in the prospectus, the defendant company was " formed for the purpose of acquiring Rilhena estate in the Pelmadulla district " from the added defendant. It was also stated in the prospectus that " the vendor further undertakes to transfer a block of 1,000 acres of land . . . immediately adjoining Rilhena, for the purchase and development of which a further issue of shares will be made as required." The subsequent proceedings in pursuance of this undertaking gave rise to this action.

It is clear from the evidence that the added defendant took an active part in the preparation of the prospectus, and was generally concerned in and responsible for many of the preliminary arrangements preceding registration. Subsequently to formation, the company on September 27, 1910, entered into a contract with the added defendant with a view to his giving effect to the undertaking referred to. This contract was notarially executed. It was not registered under section 16 of Ordinance No. 14 of 1891, and it is admitted that it was not so registerable.

The contract No. 693 (D 40), after reciting that the added defendant had agreed to sell 1,000 acres in the vicinity of Rilhena estate at the rate of Rs. 75 per acre, bound him to give effect to that agreement, to deduce a good and valid title, and provided that the purchase price for the said land " as and when the same shall be sold and delivered " should be paid to the added defendant in " cash on the sale and delivery of such land or at his option one-half of the price of all lands so sold in cash and one-half in fully paid ordinary shares in the said company." The agreement concluded with a provision that either party committing a breach of the agreement should be liable to pay " a sum of Rs. 10,000 by way of liquidated damages and not as a penalty."

Subsequently difficulties arose with regard to title, and things did not shape in all respects as it was expected they would have done. A paramount claim by the Crown with respect to three of the four blocks of land with which this action is concerned was an incident which was unexpected. It delayed matters very considerably, and was met by a supplementary agreement—this with a view to giving effect to the fundamental obligations of the contract No. 693.

[1] *(1903) 1 Ch. 509.*

The company was put into possession of the four blocks of land which are the subject-matter of this action, in 1912, and ultimately they all became vested in the added defendant, and he was in a position to transfer them to the company with a good title. But unfortunately the relations between him and the company had become strained; there were disputes and dissensions, and although at one period there seems to have been very little between them, they were unable to adjust their differences. Finally, on October 25, 1923, the added defendant transferred these properties to the plaintiff, who instituted this action to eject the company on May 15, 1924. The added defendant became a party at the instance of the company, and the action eventually went to trial on several issues involving the discussion and consideration of a large number of questions with which the learned Judge who tried the case has dealt very industriously and exhaustively in his judgment in favour of the company.

In the view I take of this case, however, I do not think it is necessary to deal with all of them for the purpose of deciding this appeal.

The first question to be considered, in my opinion, is whether the provisions of section 93 of the Trusts Ordinance, No. 9 of 1917, apply to this case. That section is as follows:—

> "Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract: Provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition."

It was urged that in view of the proviso and of the fact that the contract No. 693 was not registered the section can have no application. I do not think that the proviso can be taken to exclude this contract from the operation of the section. It applies only, in my opinion, to contracts that are registerable. I can see no reason why it should have been intended to make this section less extensive in the case of land than in the case of other property except for the purpose of ensuring that the existing law as to registration, where applicable, should be complied with. The non-registration of this contract involved no breach of the registration law. Therefore, in my view the provisions of this section apply to this case if the other conditions mentioned in the section are present.

In the first place, had the plaintiff notice of "an existing contract" between his vendor and the company?

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Firstly as to notice. On this point the evidence is most clear and precise. It might be almost described as overwhelming. The added defendant said in his evidence:—

> " Mr. Hall was well aware of the main fact deposed to by me of the agreement between the company and me and the breach of that agreement and the settlement I had obtained from the Crown and the fact that the defendant company was in possession and had opened out the land. Furthermore, I referred him to Mr. J. A. Perera, who was my lawyer, well acquainted with the facts of the case. Before the transfer in my presence Mr. J. A. Perera went into the position with Mr. Hall."

The plaintiff was an intimate friend of the added defendant and a shareholder in the company, and the effect of the evidence is that what the plaintiff himself knew and what his proctor, whom he said in his evidence he " assumed to be in a position to find out everything," knew was the entire circumstances and facts of the situation. In short, it must be taken that the plaintiff, as regards knowledge of the circumstances, was in precisely the same position as the added defendant.

It is said, however, that the company broke the contract, and the added defendant puts forward the refusal of the company, indicated in their proctor's letter of March 20, 1922 (D 96), in which they stated that the company were not " prepared to agree to the terms proposed in your letter to them of February 10 last," to pay the entire purchase money ultimately due to him in shares, as constituting a breach which entitled him to deal with the property as his own. This is what he told the plaintiff. He says in his evidence:—

> " I told Mr. Hall that the company had declined to pay a certain balance in shares, and I told him I considered that a breach of the agreement by the company."

I do not think that that can be regarded as a refusal to pay the purchase consideration or as anything approaching wilful repudiation of the contract by the company. They differed from the views of the added defendant as to their respective rights under the contract and the subsequent development of the situation between them, but it is obvious that their special interest all along has been to have the property duly vested in them, and ever since they were let into possession of the land they have been owners in everything, except in being clothed with the legal title which it lay with the added defendant to vest in them.

The situation created by the letter of March 20, 1922, did not therefore, in my opinion, constitute a final breach of the contract by the company, nor did it entitle the added defendant to treat it as such.

Moreover, the evidence shows that he did not so regard it. The subsequent history is as follows:—On March 28, 1922, the added defendant wrote (letter A, D 4) asking that his deeds might be returned, and saying that he will be shortly placing the matter in the hands of his proctor. He made no reference to his demand in his letter of February 10 that in default of meeting his claims before the 15th instant the company should surrender possession of the lands of which they were "in wrongful possession." In point of fact no further communication was at that time made to the company. He left them in possession, and he says in his evidence:—

> "I did not make any endeavour to sell the land. I did not engage a broker. I did not let it be known that I wanted to sell the land."

In their annual report (D 105) dated November 24, 1922, the directors put the matter before the shareholders as follows:—

> "The directors regret to report that they have not yet been able to arrive at a settlement with Mr. B. A. Thornhill in respect of some 150 acres purchased through him under agreement."

That report was before the annual meeting held on December 6, 1922, which the plaintiff and the added defendant attended. The matter was briefly referred to by the chairman in terms which the added defendant seeks to show conveyed to his mind that the matter was ripe for litigation, but he made no comment on the motion to pass the report. It seems to me clear that he must have realized that—so far as the board were concerned—they did not regard the agreement as at an end. Later on in the meeting the added defendant expressed a wish to make a few remarks which he said were in explanation of and "not antagonistic" to the report. He was refused a hearing on grounds which may or may not have been sound—the question is not material—and accepted the suggestion that he should put the shareholders in possession of what he wished to say by a letter to the press. Accordingly he published in the "Times of Ceylon" of December 6 a document which he had brought typewritten to the meeting. The first and second paragraphs run as follows:—

> "I wish to make a few remarks with reference to my relations with the company regarding land, as it has been brought to my notice that there is a feeling of anxiety as regards the position. A short while back a difficulty arose over the question, whether I should be paid in cash or shares and as to whether certain portions of jungle land should be taken over or not. Speaking without prejudice to my legal position with the company, I would like to assure

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the shareholders that I hope a satisfactory settlement will be reached. In the meantime, as I have been standing out of my money for over ten years, and my jungle lands have remained unplanted and unremunerative, I decided to plant up this area in tea. This is now in progress, and should be completed next year. It is my intention ultimately to offer this area to the company—some 160 acres. I would also like to say that I am the largest shareholder in the company. I therefore have the interests of the company at heart, and although differences have arisen between the directors and myself, I can assure the shareholders that no action prejudicial to their interests will be taken by me without reference to the shareholders at a general meeting."

This pronouncement seems to me to speak for itself. In his cross-examination the added defendant was given an opportunity of explaining what he meant. His attention was drawn to his words assuring the shareholders that " no action prejudicial to their interests would be taken by me without reference to the shareholders at a general meeting." But he failed, in my opinion, to show that they could be interpreted by any shareholder to mean anything else than what they say.

The position he then took up is entirely irreconcilable with the view that he at that time regarded the letter of February 10, 1922 (D 93), as a termination of the contractual relationship between himself and the company. And, moreover, in my view, it would necessarily lead the company to act and think on the footing that there was no idea on his part that such a situation had arisen.

The contract therefore being, in my opinion, " an existing contract " at the time of the transfer, why should it not be specifically enforced as regards the four blocks of land transferred to the plaintiff ? The company have been for several years in possession of this property. In the events that have happened these four blocks stand out clearly as property which was expressly allocated by the added defendant to that contract in recognition and performance of his obligations thereunder. The company, with the added defendant's full knowledge and concurrence, spent money on it and have put the land to the use which both parties had in view in fulfilment of the objects for which, with the instigation and co-operation of the added defendant, the company came into being. They cannot be held responsible or, at all events, entirely responsible, for the long drawn out discussions, proposals, and counter-proposals which took place between the parties. That being so, I can see nothing in their conduct or any circumstances which would have disentitled them at the date of the transfer to the plaintiff to a decree of specific performance.

The contract is therefore, in my opinion, an existing enforceable contract of which the plaintiff had notice within the provisions of section 93, and, that being so, not only is he disentitled to succeed in his action, but he must be taken to hold the property for the benefit of the company to the extent necessary to give effect to the contract No. 693.

It was contended that there are previous decisions of this Court (see *Fernando v. Peries*[1]) upon which independently of section 93 the defendant might be held to be entitled to a decree of specific performance against the plaintiff on the ground that he has knowingly made himself a party to a transfer which is in fraud of the rights of the company under the contract with the added defendant. But, under the circumstances, I do not think it is necessary to deal with this contention, nor with the other findings upon which the learned Judge has based his judgment, though I must not be taken to dissent from them.

In my opinion, therefore, the judgment of the District Judge must be affirmed with one or two slight modifications upon which there was no argument, but to which the company through their counsel expressed themselves as agreeable, namely: First, giving credit to the added defendant for the sum of Rs. 5,000 damages, to which it was at one time conditionally agreed he should be entitled; and secondly, that he should be entitled, should he so elect and give notice in writing of his election to the company within one month from the date of this judgment, to receive payment for the lands in question, partly or entirely, in fully paid ordinary shares of the defendant company.

The appeals are dismissed, with costs. The plaintiff and the added defendant must pay the costs of these appeals.

GARVIN J.—I agree.

Appeal dismissed.